IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-151

HARRY T. MANGURIAN, JR. and DOROTHY MANGURIAN, his wife, and DREXEL PROPERTIES, INC., a Florida corporation, *Petitioners,*

v.

CLAYTON P. THOMPSON, WILLIAM M. WYANT, and VIRGINIA WYANT, his wife, individually and on behalf of all others similarly situated, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit in the above case, entered April 4, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, which reversed an order of the District Court (granting Petitioners' motion for summary judgment on the ground that the action was barred by the statute of limitations) and which remanded the case to the District Court, is re-

ported as *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian* in 549 F.2d 1029 and appears in Appendix A.

The opinion of the District Court for the Southern District of Florida is reported as *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian* in 407 F. Supp. 870 and appears in Appendix B.

JURISDICTION

The order of the Court of Appeals of which review is sought was entered on April 4, 1977. Petitioners' timely petition for rehearing and rehearing en banc was denied by order of the Court of Appeals on April 28, 1977. This petition for a writ of certiorari is filed within 90 days of April 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented, which were correctly resolved by the District Court, but reversed by the Circuit Court are:

Issue I

Whether an antitrust action based on an alleged illegal tie between the sale of a condominium unit and the leasing of recreational facilities must be commenced within four years after the date of the transaction.

Issue II

Whether the mere collection of rent operates to extend the time within which the foregoing action must be brought.

STATUTORY PROVISIONS INVOLVED

Insofar as Respondents claim treble damages and attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15, the applicable statute is 15 U.S.C. § 15b. Such statute provides, in pertinent part:

> 15 U.S.C. § 15b. *Limitation of actions.*
>
> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

There is no federal statute limiting the time to bring injunctive relief, which Respondents also claim under Section 16 of the Clayton Act, 15 U.S.C. § 26, however, the Florida Statutes provide, in pertinent part, as follows:

> F.S. § 95.11. *Limitations other than for the recovery of real property.*
>
> "Actions other than for recovery of real property shall be commenced as follows:
>
> . . . .
>
> (3) Within four years—
>
> . . . .
>
> (f) An action founded on a statutory liability.
>
> . . . .
>
> (1) An action to rescind a contract.
>
> . . . .
>
> (n) An action for a statutory penalty or forfeiture.
>
> . . . .
>
> (p) An action not specifically provided for in these statutes.
>
> . . . .

(6) Laches—Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law."

STATEMENT OF THE CASE

A. Basic Facts

This is an action for treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

Respondents allege that the sale by Drexel Properties, Inc. (the "Developer") of residential units in a condominium, together with an undivided interest in a lease of contiguous land for recreational use (the "Lease") with Harry T. Mangurian, Jr. (the "Lessor"), constituted an illegal tie under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14.

Respondents have admitted that they entered into the transaction more than four years before they commenced suit.

B. Proceedings in the District Court

The District Court granted Petitioners' Motion for Summary Judgment on the ground that:

> "The statutes gave them four years to assert the claims that they now bring. . . . They failed to question the validity of the arrangement within the statutory period and so their claims must be foreclosed due to their own inaction."[1] (A-33a)

C. Proceedings in the Court of Appeals

The Court of Appeals reversed the District Court, holding that as long as Mangurian continued to collect rent under the Lease, Respondents' causes of action continued to accrue. (A-29a)

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[1] While not specifically mentioned by the court, Respondents' plea for injunctive relief was apparently determined by the same four year standard.

The Seventh Circuit is in accord with this view. *Baker* v. *F & F Investment*, 420 F.2d 1191, 1193 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970), specifically holds that claims are governed by laches rather than the statute of limitations only when they are solely equitable and not when equitable relief is joined to a claim for monetary damages.

The Ninth Circuit arrives at the same result by using the statute of limitations contained in 15 U.S.C. § 15b as a "guideline" for injunctive actions brought pursuant to 15 U.S.C. § 26. *International Tel. and Tel. Corp.* v. *General Tel. and Elec. Corp.*, 518 F.2d 913, 928, 929 (9th Cir. 1975).

If reference is made to the corresponding Florida statute the result is the same, for F.S. 95.11(6) specifically states that:

> "Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter. . . ."

and this Court, in *Russell* v. *Todd*, 309 U.S. 280, 293 (1940), has stated:

> "We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts."

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Other Courts of Appeal As To When "The Cause of Action Accrued" Under 15 U.S.C. § 15b.

Sixth Circuit

The Court of Appeals for the Sixth Circuit has interpreted the statute of limitations in antitrust cases strictly. In a recent case, *Akron Presform Mold Company* v. *McNeil Corporation,* 496 F.2d 230 (6th Cir. 1974), *cert. denied* 419 U.S. 997 (1974), in which Presform asserted *continuing* monopolistic activities injurious to itself, among which was enforcement of an injunction which was fraudulently obtained,[2] the Court of Appeals observed that the only exceptions to the Rule were:

> a) the exception enunciated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 at 338-342 (1971), providing that the plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct prior to that period if, at the time of the conduct, the damages were speculative, uncertain, or otherwise incapable of proof; and
>
> b) cases in which plaintiff has refrained from commencing suit during the period of limitations because of inducement by the defendant, as illustrated by *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) (in which the defendant misrepresented the period of the statute of limitations to the plaintiff), or because of fraudulent concealment, as illustrated by *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946) (in which the defendant had concealed his ownership of bank stock to avoid the double liability then imposed on such

[2] 496 F.2d at 232

> holders in the event of failure of the bank), where the statutory period has been suspended or tolled by the conduct of defendant.[3]

The Court went on to say:

> "Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them had the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions. See e.g. *Baker* v. *F & F Investment,* 420 F.2d 1191, 1199 (7th Cir. 1970); 51 Am.Jur. 2d, Limitations of Actions, § 485; 54 C.J.S., Limitations of Actions, § 386b.
>
> Since the complaints in the present action were filed on July 3, 1968, the first question is whether any injurious overt act has occurred since July 3, 1964. Presform admitted to the trial court that *all acts commencing the alleged unlawful conspiracies began more than four years before the filing of the complaints in these actions,* but contended that its antitrust claims were not barred because its claims fell within the *Zenith* and fraudulent concealment exceptions to the application of the statute of limitations. The burden thus shifted to Presform to prove that the operation of the statute could be avoided by either exception."[4] (emphasis supplied)

Since neither of the exceptions were shown, the Court of Appeals for the Sixth Circuit held that the District Court had been correct in determining that the claims were barred by the statute of limitations.

[3] *Id.* at 233

[4] *Ibid.*

In the case sub judice, any cause of action which Respondents might have had was fully vested at the time of execution of the Lease, any damages were then fully ascertainable, and there is no claim of fraudulent concealment or inducement by Petitioners.

Ninth Circuit

In *Steiner* v. *20th Century-Fox Film Corporation,* 232 F.2d 190 (9th Cir. 1956), the issue regarding the statute of limitations and when it begins to run was discussed with respect to an alleged civil conspiracy. Appellant in that case contended that, where damages are in their nature continuing, the statute runs from the date of the last injury. The Court of Appeals for the Ninth Circuit stated at page 194, 195:

> "Under this view the statute of limitations would not run until all injury to a claimant has ceased. We must disagree. In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage .... (at page 194) ... Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the *beneficent purpose of the statute to delimit the right to sue would be defeated.*" (at page 195) (emphasis supplied)

In *Steiner,* the alleged overt acts concerned lease terms obtained by appellees in 1935, 1936 and 1937; an option to renew which was received in 1938; and finally the closing of the movie theatre in controversy, which occurred in 1952. The action was filed in 1951. The court held that only the closing of the theatre was sufficient to bring the complaint outside the bar of the 3

year statute of limitations.[5] The other acts were well before 1951 and:

> "*Every time appellant and her predecessors executed a contract for a rental less than a fair rental she knew or should have known the nature and extent of the damages* attributable to overt acts occurring in 1932, 1933, 1935, 1936 and 1937. The statute of limitations has run upon all of these, ..."[6] (emphasis supplied)

The Court of Appeals for the Fifth Circuit apparently believed that *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975), showed a change of attitude by the Ninth Circuit since the rendition of its opinion in *Steiner.* (A-19a, 20a, 25a) However, the facts in that case are distinguishable from the facts in the present case. The Twin City case involved an attempt to break an exclusive concession contract. The court found that if monopolization of the market were proven (which the court did not feel was demonstrated by the record in the lower court), there would be a *continuing violation.* Certainly the operation of an exclusive concession business is more susceptible to finding a monopoly of the market by "continuing acts" than the sale of real property together with a lease, which was complete upon execution and involved no other act. Furthermore, in the *Twin City* case, the court apparently thought that the damage was not fully determinable at the time the last extension was made to the concession contract, an established exception to the statute of limitations.[7] This is in contrast

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[5] 232 F.2d at 195

[6] *Id.* at 199

[7] 512 F.2d 1264 at 1270 states:

"Thus the fact that the final amendment to the contract was

to the instant case in which all damages were fully ascertainable at the time the Lease was entered into.

Second Circuit

There does not appear to be any reported opinions of the Second Circuit construing the precise statute of limitations point here involved. There are, however, opinions of the District Court, not disturbed on appeal, which support Petitioners' position as against that of the Fifth Circuit.

Korn v. *Merrill,* 403 F. Supp. 377 (S.D.N.Y. 1975), *aff'd* 538 F.2d 310 (2nd Cir. 1976), involved a derivative action by a shareholder in an investment company to recover, among other things, fees paid its investment advisor under a contract which was alleged to be illegally acquired by such investment advisor from the former investment advisor. Since the transfer had occurred outside the period of the applicable statute of limitations, plaintiff contended that the continuing payments under the contract created new causes of action. In rejecting the argument, the District Court stated (at page 388):

> "It is clear . . . that these payments do not constitute independent wrongs but rather flow from the reinstitution of the Fund-FAIMCO agreement in 1968 as part of the AMEXCO-FAC merger deal. No independent event subsequent to the sale of FAIMCO in 1968 has been complained of in this action.

---

made in 1954 does not preclude Finley from bringing suit in 1968. To hold otherwise is to say that some damage that might have been sustained was barred before it accrued."

See ***Zenith Radio Corp.*** **v.** ***Hazeltine Research, Inc.,*** **401 U.S. 321, 339 (1971)**

> *In effect, plaintiff is attempting to convert what would otherwise be an element of damages flowing from an alleged wrong no longer actionable because of the statute of limitations bar, into a series of independent and continuing injuries."* (emphasis supplied)

The principal case cited by the District Court in support of its holding was *Lowell Wiper Supply Co.* v. *Helen Shop, Inc.,* 235 F. Supp. 640 (S.D.N.Y. 1964), which was a stockholders' derivative action to recover excessive rent collected by the controlling stockholder under a lease last renewed outside of the applicable statute of limitations. In rejecting plaintiffs' argument that the leases were continuing wrongs and that each payment of rent represented a separate wrong, the court stated:

> "The courts of New York have consistently rejected the theory advanced by plaintiffs that each payment pursuant to a wrongful agreement gives rise to a separate and distinct claim, whether the theory was invoked to establish capacity of a shareholder to sue or to overcome the bar of a statute of limitations. The continued payments merely reflect the damages sustained by the party wronged." *Id.* at 644.

In *Landon* v. *Twentieth Century-Fox Film Corp.,* 384 F. Supp. 450 (S.D.N.Y. 1974), one of the alternative holdings was that a cause of action for an allegedly unlawful tying agreement (in this case, the requirement by defendant that a renewal right be granted to it as a condition of its purchase of a copyright from plaintiff) accrued in 1944 when the copyright was sold, and not in 1972 when defendant exercised the renewal right, the court stating that "claims based on anti-competitive agreements to which the plaintiff is a

party accrue at the time of their execution" unless tolled because damages are incapable of proof.[8] The District Court cited as authority earlier New York cases, *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 406 (S.D.N.Y. 1961); *Fleischer* v. *A.A.P., Inc.*, 180 F. Supp. 717 (S.D.N.Y. 1959), *aff'd on other grounds* 329 F.2d 424 (2nd Cir. 1964), *cert. denied* 379 U.S. 835 (1964).

B. In Deciding That Each Collection of Rent Under a Recreational Lease—Alleged To Be Illegally Tied to a Residential Unit—Starts a New Cause of Action, the Court Below Has Decided An Important Question of Federal Law.

Such Interpretation Will Open a Floodgate of Potential Litigation in Contravention of the Express Intent of Congress Unless Now Settled By the Supreme Court.

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), are the two cases usually cited by the United States Courts of Appeal in interpreting "when the cause of action accrued" for the determination of the commencement of the four year statute of limitations contained in 15 U.S.C. § 15b.

In the *Zenith Radio* case, the principal question before the Court was whether damages arising from a cause of action occurring outside the limitation period were barred.[9] This Court determined that since, in that case, the future damages were too speculative, the statute was tolled as to those damages until they oc-

[8] 384 F. Supp. at 458

[9] 401 U.S. at 321, 338

curred; otherwise, even if injury and a cause of action had accrued as of a certain date, future damages that might arise would be unrecoverable.[10]

From the foregoing, it can be readily seen that the decision in the *Zenith Radio* case has no application to the present case. Respondents have not asserted any of the recognized exceptions to the statute of limitations, including the exception set forth in the *Zenith Radio* case, but have claimed that each collection of rent on the Lease starts a new cause of action.

In the *Hanover Shoe* case, the only mention of the statute of limitations is in a footnote in which this Court said:

> "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span, Cf. *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714 (C.A. 7th Cir. 1956) . . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." [11]

While, as in this case, a lease was involved in the *Hanover Shoe* case, the lease was used to further an illegal purpose. The lease was alleged to be *an instrument for the exercise and maintenance of an unlawful monopolization* of the shoe machinery industry.[12] The District Court and the Court of Appeals concluded

[10] *Id.* at 338

[11] 392 U.S. at 502 n. 15

[12] *Id.* at 483

that the necessity of leasing and the refusal to sell its major machines were means of continuing the illegal monopolization, and this Court agreed.[13] In the present case, it was the original tying of a lease of land for recreational use to the condominium unit which is alleged to be illegal. Once the transaction was entered into, there was no further activity, nor could there be because the land was no longer in the control of the Lessor or the Developer. The only illegality, if there was one, occurred when the Developer sold the residential unit tied to the recreational Lease.[14]

This Court has thus not ruled on the precise issue involved in this case.

The issue is important because the court below has interpreted a federal statute contrary to the intent of Congress.

Prior to the enactment of 15 U.S.C. § 15b, and in the absence of a specific statute of limitations in the Sherman and Clayton Antitrust Acts, federal courts had been applying the statute of limitations of the state in which the action was brought. In order to obtain uniformity and prevent forum shopping, Congress, in 1955, enacted a uniform limitation period of four years. There was no intention of removing limi-

[13] *Id.* at 487

[14] Specifically left open by the Court of Appeals was the question whether the condominium units and the Lease were two separate products, (A-2a, n. 1) Indeed, a decision that they were two separate products would lead to absurd results and allow, by analogy, a purchaser of a house with an outdoor swimming pool or tennis court to sue the seller for treble damages for tying such recreational facilities to sale of the house instead of separating them and allowing him the choice of accepting or rejecting the recreational facilities.

tation periods that had previously been applied; the only intent was to make the period uniform.[15]

By characterizing the collection of rent under the Lease as an injurious "act",[16] the Court of Appeals is ignoring the express intent of Congress.

The decision of the Court of Appeals makes the statute of limitations a mere measure of damages.[17]

The decision, if allowed to stand, opens the antitrust field to a floodgate of potential litigation affecting not only leases but all kinds of contractual rights which involve the collection of rents or installment payments subsequent to the cessation of all other market or business activity. Furthermore, it affects not only recreation leases, which are the alleged violation in the instant case, but any similar leases (for instance, ground leases) which, by the ingenuity of counsel, can be stated as an antitrust violation.

This avalanche of litigation could involve causes of action 50, 60, 70, 80, or more years after the original transaction. It could also involve innocent investors and financial institutions who had acquired contract rights as an investment or as security for a loan and who had no knowledge of the original transaction.

Furthermore, statutes of limitations also rest upon other grounds, as noted in *Pearson* v. *Northeast Air-*

[15] Senate Report No. 619, 84th Cong. 1st Sess. pp. 4, 5 (1955), U.S. Code Congressional and Administrative News, 1955, p. 2328.

[16] "We therefore hold that so long as Mangurian continues to collect rent from these plaintiffs under the lease, plaintiffs' causes of action for the conspiracy continue to accrue." (A-29a)

[17] ". . . we adhere to the rule that plaintiffs may sue only for damages that result from acts committed by the defendants within the four years preceding commencement of suit." (A-29a)

lines, Inc., 309 F.2d 553, 559 (2nd Cir. 1962), *cert. denied* 372 U.S. 912 (1963):

> "It is true that one of the purposes of the statute of limitations is to relieve a court system from dealing with 'stale' claims where the facts in dispute occurred long enough ago that evidence is either forgotten or manufactured. But the wide variety of statutory periods cannot be explained solely on the basis of stale evidence. *There is no doubt another element, of a more 'substantive' character, (exists) which might be described as a concern for the interests of the potential defendant.*" (emphasis supplied)

C. The Court Below Has Decided a Federal Question Which Conflicts With the Nearest Applicable Decisions of the Supreme Court.

After stating the basic rule as set forth in the *Zenith Radio* case, 401 U.S. at 338, that "Generally, a cause of action accrues and the statute begins to run when the defendant commits an act that injures a plaintiff's business", (A-8a), the Court of Appeals in the case at bar, still quoting from the *Zenith Radio* case, 401 U.S. at 338, went on to say (A-9a):

> "In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

and then, with great legerdemain, switched the discussion to its own leading case on the subject, *Poster Exchange, Inc.* v. *National Screen Serv. Corp.*, 517

F.2d 117 (5th Cir. 1975), *cert. denied* 425 U.S. 971 (1976) (A-9a).

In that case, there was an alleged conspiracy among the defendants who refused to sell certain articles to plaintiff. Although the cutoff date was 1961, the plaintiff did not file its antitrust suit until 1969, and the district court held that the recovery was barred because more than four years had elapsed between the cutoff of supplies to plaintiff and the commencement of suit. The Court of Appeals reversed and remanded on the grounds that, if there had been a specific act or word of refusal by defendants to deal with plaintiff during the limitations period, then the plaintiff would be entitled to maintain the suit. The court concluded that a reiteration of defendants' refusal to deal would have constituted such an "act" within the meaning of *Zenith Radio* and thus give rise to a new cause of action.[18]

Since in the *Zenith Radio* case the conspiracy involved the monopoly of a market, each refusal to deal would constitute a violation *per se* of the antitrust laws. As this Court stated in the *Zenith Radio* case, each time a plaintiff is injured by an act of the defendants, a cause of action accrues "[i]n the context of a continuing conspiracy to violate the antitrust laws, ..."[19]

Although the facts in the *Poster Exchange* case met this premise, the Fifth Circuit in its opinion in that case went on to promulgate a further test for determining when a cause of action accrues, namely:

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[18] 517 F.2d at 128, 129

[19] 401 U.S. at 338

> "Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act." [20]

The Fifth Circuit in the instant case interpreted this to mean "that where all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff*." (A-11a) However, the Fifth Circuit found that the facts in the *Poster Exchange* case did not come within the scope of this test, because defendants could have ceased causing the injury at any time by agreeing to deal with plaintiff. The court in the *Poster Exchange* case went on to state that while such action was perhaps unequivocal, it was not of necessity permanent.[21]

At first glance, it would appear that this test is merely a restatement of the basic rule that a cause of action accrues each time a defendant commits an act that injures a plaintiff. However, the real import of this test can be seen when applied to cases that do not come within the concept of "continuing violation" as set forth in the *Zenith Radio* case. An excellent example is the present case. As discussed previously, there was no continuing violation because, upon the execution of the Lease, the tied product was taken out of the

[20] 517 F.2d at 126

[21] *Id.* at 127.

control of the Lessor and the Developer, and no further acts were possible. No further market activity took place. The only violation, if any, was the original tying of the sale of the residential unit to the recreational Lease. Since the alleged violation was complete on the sale of the residential unit, there could be no further injurious act by Petitioners within the "continuing violation" concept of the *Zenith Radio* case. However, under the new test promulgated by the Fifth Circuit, although the alleged tie was consummated in the pre-limitations period, the fact that Petitioners collected rent within the limitations period constituted acts which injured Respondents on the grounds that the damages complained of did not "necessarily" result from the pre-limitations act because Petitioners could have stopped collecting the rent.

Thus, a careful analysis of the Court of Appeals for the Fifth Circuit's application of its new test to the instant case demonstrates an ingenious means of avoiding the bar of the statute of limitations, which is in direct conflict with the principles set forth by this Court in the *Zenith Radio* case. In effect, the court below is attempting to convert what would otherwise be an element of damages flowing from an alleged wrong no longer actionable because of the statute of limitations bar into a series of independent and continuous injuries, see, *Korn* v. *Merrill,* 403 F. Supp. 377 (S.D. N.Y. 1975), *aff'd* 538 F.2d 310 (2nd Cir. 1976).

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968), this Court found that the leases themselves were violations of the antitrust act. It had previously been determined that the defendant's actions in requiring plaintiffs to lease instead of per-

mitting them to purchase the shoe machinery were essential for the exercise and maintenance of the monopoly power. This Court determined, therefore, that the collection of rent under such leases was "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover".[22] In the instant case, there was no continuing violation because, upon the execution of the Lease, the tied product was taken out of the control of the Lessor and the Developer. It is evident, therefore, that the only illegality in the instant case, if there was one, occurred when the Petitioners sold the residential unit tied to the recreational Lease. The Lease itself was, as the court below conceded, "on its face . . . lawful". (A-28a) Thus, if there was a conspiracy to violate the antitrust laws, it was concluded upon the sale by Petitioners and the assumption of the Lease.

It is submitted that, under these circumstances, the court below erred in reaching a contrary conclusion in the instant case based on language which it took out of context in the Court of Appeals for the Third Circuit's opinion in the *Hanover Shoe* case. (A-16a) In its opinion, the Third Circuit pointed to the defendant's collection of rent within the limitations period on leases executed outside the period as an "act", in addition to the refusal to deal, injurious to plaintiffs."[23] However, as pointed out previously, these "acts" are violations in themselves because they support and maintain a monopoly. In the instant case, there was no monopoly to support, and, therefore, the substance of the Third Circuit's language is not applicable.

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[22] 392 U.S. at 502n.15

[23] 377 F.2d 776, 793-95 (3rd Cir. 1967), *aff'd in part, rev. in part* 392 U.S. 481 (1968)

The mere collection of rent under an allegedly illegally tied, but otherwise legal lease, finalized at its inception, as in the instant case, is merely a passive act and not an "overt" act as in the *Hanover Shoe* case. It is "merely the abatable but unabated inertial consequences of some pre-limitations action" which the court below recognized as a valid rule of law in its opinion in the instant case. (A-11a)

In short, the Court of Appeals for the Fifth Circuit has not followed this Court's holdings in the *Hanover Shoe* and *Zenith Radio* cases.

Finally, if outright purchase of an interest in the recreational facilities had been required at the time of Respondents' purchase of the residential unit, the statute of limitations would have commenced to run at that time. The fact that the seller leased rather than sold the recreational facilities should not change the result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 76-1657.

IMPERIAL POINT COLONNADES CONDOMINIUM, INC., a Florida non-profit Corporation, in its own interest and behalf of its members, *Plaintiffs*,

Clayton P. Thompson, William M. Wyant, and Virginia Wyant, his wife, Individually and in behalf of all others similarly situated, *Plaintiffs-Appellants*,

v.

HARRY T. MANGURIAN, JR., and Dorothy Mangurian, his wife, and Drexel Properties, Inc., a Florida Corporation, *Defendants-Appellees*.

April 4, 1977.

Before MORGAN and GEE, Circuit Judges, and HUNTER,* District Judge.

LEWIS R. MORGAN, Circuit Judge:

In this case we must decide a question concerning when a cause of action accrues under the four year statute of limitations for private treble-damage antitrust suits, Clayton Act § 4B, 15 U.S.C. § 15b. Plaintiffs purchased new condominiums from one of the defendants. As a condition of the purchase, they were required to enter a 99 year lease of nearby recreational facilities with the other defendant, who is president and sole stockholder of the first defendant. Plaintiffs allege that this requirement constitutes an unlawful tying agreement and that the defendants have

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* Senior District Judge for the Western District of Louisiana, sitting by designation.

conspired together to restrain interstate commerce by means of it.

The district court granted summary judgment for defendants on the ground that plaintiffs' suit, filed more than four years after they purchased the condominiums and joined the lease, was barred by the statute of limitations. That court held that plaintiffs' only cause of action accrued when they purchased the condominiums and joined the lease, rejecting plaintiffs' argument that new causes of action, not barred, accrued when the defendants committed acts with respect to the lease within the limitations period. For the reasons stated in this opinion, we reverse and remand. We do not, of course, pass on any of the other issues that remain to be resolved below.[1]

I. Facts

Defendant Harry T. Mangurian, Jr. is and, at all times material to this action, has been president, director and sole stockholder of a Florida corporation known as Drexel Properties, Inc. Drexel Properties, the other defendant, is the developer and was the owner of a 23 building, 552 unit residential condominium project located in Florida and called Imperial Point Colonnades Condominium.

Mangurian also is the owner of land adjacent to Imperial Point Colonnades upon which recreational facilities have been built. Mangurian leased the land and its facilities to Drexel Properties on February 1, 1969 for a term of 99 years.[2] The lease provides that on April 1, 1972, and at the end of every three years thereafter, the annual rent shall be adjusted with reference to the Department of Labor's Consumer Price Index in such a way that the rent will

[1] Specifically, we assume without deciding that the condominium units and lease are two separate products.

[2] Mangurian's wife Dorothy, who has dower rights in the leased land, also joined the lease and is named as a defendant.

remain constant in real purchasing power. Record Vol. I at 9-10.

When a person bought a condominium in Imperial Point Colonnades from Drexel Properties, the contract of sale provided that the purchase was subject to the terms of the Declaration of Condominium by which Drexel Properties had submitted the land to the condominium form of ownership.[3] This Declaration, in turn, contains a number of provisions relating to the recreational lease. It requires each unit purchaser, as a condition precedent to ownership, to accept assignment from Drexel Properties of a 1/552 undivided interest in the lease and to assume an obligation to Mangurian for a like proportion of the rent. It also requires each unit purchaser to pledge his unit to Mangurian as security for fulfillment of the obligation under the lease.[4] Finally, it requires, as a condition to any subsequent transfer of ownership of the condominium units, that the transferee assume the transferor's obligation under the lease.

[3] Florida statutory law creates the legal framework within which condominiums exist. *See generally* Fla.Stat.Ann. ch. 718 (Supp. 1977) (West) (effective Jan. 1, 1977), *repealing and replacing* Condominium Act, 1963 Fla.Laws, ch. 63-35 (former Fla.Stat.Ann. ch. 711 (1969) (West)).

[4] Article III of the Declaration of Condominium, Record Vol. I at 4, provides:

> Each unit owner shall pay directly to the lessor the sum of One-Hundred-Forty-Eight & 50/100 Dollars. quarter annually, on January 1st, April 1st, July 1st and October 1st of each and every year during the term of that certain recreational lease entered into by Drexel Properties, Inc., lessee, and Harry T. Mangurian, Jr., as lessor. . . . It shall be a condition precedent to unit ownership that each apartment owner becomes a lessee of said recreational lease pursuant to an assignment of a One Five Hundred and Fifty Seconds (1/552nds) undivided interest therein, and pledge his apartment to the lessor as security for the performance of his duties thereunder.

On January 4, 1969 plaintiffs William M. Wyant and Virginia Wyant (husband and wife) signed an agreement with Drexel Properties to purchase a condominium unit in Imperial Point Colonnades. On May 28 of that year the Wyants accepted assignment of a 1/552 undivided interest in the recreational lease and executed a pledge of their unit as security for their obligations under the lease, and Drexel Properties transferred title to the unit to them. On December 6, 1969 plaintiff Clayton P. Thompson signed a similar purchase agreement with Drexel Properties, and on July 28, 1970 he accepted assignment of his portion of the lease, executed the required pledge, and received title to a unit.

On July 15, 1975 Drexel Properties, as agent for the lessor, sent unit owners a letter informing them that the lessor had "elected" to increase the rent on the recreational lease pursuant to the cost-of-living escalator clause. Record Vol. III at 425-28.[5] The quarterly rent due from each unit

[5] A good deal of other contact among purchasers, Drexel Properties, and Mangurian apparently continued to take place. On September 23, 1972 a so-called "Settlement Agreement" was executed by Drexel Properties, both Mangurians, and officers of the not-for-profit association called Imperial Point Colonnades Condominium, Inc. [hereinafter the "Association"] which represents all Imperial Point unit owners. (Florida law provides for formation of an "association" of unit owners to manage common areas, collect assessments, and perform other operations for the condominium as a whole. Fla.Stat.Ann. §§ 718.111-114 (Supp. 1977) (West), *repealing and replacing* Condominium Act, 1963 Fla.Laws, ch. 63-35, §§ 12-13; 1965 Fla.Laws, ch. 65-9, § 1.) By this document Drexel Properties agreed to remedy a number of complaints relating to the construction of the condominium units. Drexel Properties and the Association agreed to cooperate in securing from each unit owner written acknowledgments ratifying and consenting to the Declaration of Condominium, supplements thereto, and the lease, and Drexel Properties agreed to take legal action against any unit owner who would not sign such an acknowledgment. Drexel Properties and the Association also released all claims against each other except those covered in the agreement.

By the same document the Mangurians, as lessors under the recreational lease, agreed to waive their right to a cost-of-living

owner, which was $148.50 at the inception of the lease and which apparently had been increased to $171.86 sometime after January 1, 1973, now was increased to $216.06, retroactive to April 1, 1975. The letter also stated that the lessor did "not believe that recent legislation abrogating the enforcement of cost of living clauses in leases is valid to deprive persons of vested contractual rights."[6] Finally, the letter warned that those unit owners who previously had reduced their quarterly rental payments from $171.86 back to $148.50 were considered to be in "default of their contractual obligations," and it requested that deficiencies be paid "forthwith."[7]

Meanwhile, on January 8, 1975 Thompson and the Wyants, who had continued to pay the rent demanded, filed suit in federal district court against Mangurian and Drexel

increase in rent under the lease prior to January 1, 1973. They also agreed to execute a "declaration of subordination," so as to subordinate their liens on the units for rent to certain first mortgages in favor of institutional mortgagees. They further agreed to amend the default provisions of the lease, including those provisions relating to "defaulting assignees."

On December 1, 1972 plaintiff Thompson executed an instrument entitled "Joinder and Consent to Amendment of Declaration of Condominium of Imperial Point Colonnades Condominium." Record Vol. I at 125. By this document he "acknowledge[d] and ratif[ied] the terms of the Lease, as amended, between" Mangurian and Drexel Properties, as well as joining in and consenting to certain amendments to the Declaration of Condominium. (These latter amendments are not part of the record before us.) On February 8, 1973 the plaintiffs Wyant executed a similar document. Record Vol. I at 124.

[6] The "recent legislation" referred to may have been Fla.Stat. Ann. § 718.401(8) (Supp.1977) (West), which declares void as against public policy escalation clauses in recreational leases.

[7] The record also contains a letter dated September 30, 1975 from an agent of Mangurian to a unit owner, not a party here, notifying him of default in payment on the lease and threatening foreclosure. Record Vol. III at 429.

Properties.[8] Count I of the complaint, after outlining the purchase and lease arrangements described above, alleged that the requirement that purchasers become parties to the lease constituted a tying agreement unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1,[9] and Section 3 of the Clayton Act, 15 U.S.C. § 14.[10] It also alleged that defendants, through use of the tying agreement and enforcement of the lease, had conspired and were conspiring in restraint of interstate commerce in violation of Section 1 of the Sherman Act. Plaintiffs alleged that they were damaged by being required to pay rent on the lease whether they used the recreational facilities or not, by being prohibited from transferring ownership of their units free from the lease, and by being precluded from contracting with other

[8] The complaint also named the Association as a plaintiff, but the court dismissed it as a party for lack of standing. Record Vol. III at 354; see *Burleigh House Condominium, Inc.* v. *Buchwald*, 546 F.2d 57 (5th Cir. 1977); *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934 (5th Cir. 1976). The complaint sought class certification, which the court denied. Record Vol. II at 237-39. Neither of these rulings is before us now.

[9] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

[10] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

concerns for recreational facilities. The complaint sought treble damages, costs, and attorneys fees under 15 U.S.C. § 15, injunctive relief under 15 U.S.C. § 26, and a declaration that the lease assignments were illegal and void.[11]

Defendants pleaded the statute of limitations as a bar to the prayer for damages and laches as a bar to the prayer for equitable relief. Both parties submitted documents, answers to interrogatories, and other discovery materials. The district court then granted defendants' motion for summary judgment on the ground that the statute of limitations barred plaintiffs' suit for damages. That court did not discuss whether laches barred the request for equitable relief. *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 407 F.Supp. 870 (S.D.Fla. 1976). Plaintiffs appeal.

II. General Principles

Section 4B of the Clayton Act, 15 U.S.C. § 15b, which Congress added effective January 7, 1956, places the following limitation on private treble-damage suits under 15 U.S.C. § 15:[12]

[11] In separate counts, the complaint alleged various pendant state claims; it also alleged that the rent escalation clause violated the Gold Clause Joint Resolution of 1933, 48 Stat. 113, 31 U.S.C. § 463. The court dismissed all these other counts, Record Vol. I at 138-40, Vol. III at 354, and these rulings are not before us now.

[12] Before this section was enacted, treble-damage suits were subject to the various states' statutes of limitations. The section was intended to provide a uniform nationwide statute of limitations on treble-damage suits. *See* S.Rep. No. 619, 84th Cong., 1st Sess. 5 (1955); H.R. Rep. No. 422, 84th Cong., 1st Sess. 7 (1955).

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides the jurisdictional basis for private treble-damage suits:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

> Any action to enforce any cause of action under [section 15] of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Much confusion has surrounded the question, critical to resolution of this case, of when a plaintiff's antitrust cause of action should be considered to have "accrued."[13] The leading case on this issue is *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), where the Supreme Court summarized its understanding of when a cause of action accrues:

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued,' 15 U.S.C. 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when the defendant commits an act that injures a plaintiff's business. [cites] This much is plain from the treble-damage statute itself. 15 U.S.C. § 15.

401 U.S. at 338, 91 S.Ct. at 806. The Court went on to explain how this rule operates where a plaintiff alleges that he has been injured by a conspiracy to violate the antitrust statutes, *id.*:

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therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[13] *See generally* Wheeler & Jones, *The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?*, 41 U.Chi.L.Rev. 72 (1973); Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 Nw.U.L. Rev. 29 (1962).

> In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.[14]

Under *Zenith*, where defendants are alleged to have committed acts injurious to a plaintiff pursuant to an unlawful conspiracy, and where defendants committed some such acts more than four years before plaintiff commenced suit, and other such acts less than four years before plaintiff commenced suit, the plaintiff is allowed to recover damages resulting only from those acts committed less than four years before commencement of his suit. This much is clear from our own leading case on the subject, *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), where we dealt with an alleged conspiracy among the defendants to refuse to sell certain articles to plaintiff. In that case it was undisputed that defendants had stopped supplying plaintiff with these articles in 1961. Plaintiff filed its antitrust suit in 1969, and defendants argued successfully to the district court that recovery should be barred because more than four years had elapsed between the cutoff of supplies to plaintiff and the commencement of suit.

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[14] The Court went on to hold that there is an exception to this rule in cases where the defendant committed the act causing injury more than four years before plaintiff commenced suit, but where damages resulting from the act could not have been proven with the requisite certainty until more than four years after the commission of the act. In such cases, the Court held, the cause of action does not accrue until damages can be reasonably established. 401 U.S. at 339-42, 91 S.Ct. 795; *see Poster Exchange, Inc.*, v. *Nat'l Screen Serv. Corp.*, 456 F.2d 662, 666-68 (5th Cir. 1972). This branch of *Zenith* is not involved in the instant case.

Relying heavily on *Zenith*, we reversed and remanded summary judgment for defendants. We held that plaintiff would be entitled to maintain the suit if, on remand, it could show that "there had been a specific act or word of refusal [by defendants to deal with plaintiff] during the limitations period." 517 F.2d at 129. This was so because such a reiteration of defendants' refusal to deal would have constituted an "act" within the meaning of *Zenith* and because "each injurious act of a continuing conspiracy gives rise to an antitrust cause of action." *Id.* at 127; *see also Braun* v. *Berenson*, 432 F.2d 538 (5th Cir. 1970).

In the course of the *Poster Exchange* opinion we were careful to sound two caveats. First, we distinguished cases where all the damage complained of by plaintiff necessarily resulted from an initial, pre-limitations act:

> Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.

Id. at 126-27. *Poster Exchange* itself was not such a case, though, because defendants could have quit causing the injury at any time by agreeing to deal with plaintiff, *id.* at 127:

> [H]ere where the action complained of was the exclusion of [plaintiff] from any participation in the . . . industry, such action, while perhaps unequivocal, was not of necessity permanent . . .

Our second caveat was a reminder that a cause of action will not lie for damages that occur within the four years preceeding suit, if those damages result solely from acts committed by the defendant outside the four-year period, *id.* at 128:

> [C]ontinuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.[15]

Read together, then, our two caveats amount to a restatement of the basic rule that a cause of action accrues each time a defendant commits an act that injures plaintiff. The first caveat emphasizes that where all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff*. The second caveat emphasizes that where a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitation period, no new cause of action accrues for the damages occurring within the limitations period *because no act committed by the defendant within that period caused them.*

III. Application to this Case

With these principles in mind, we turn to the parties' contentions. Plaintiffs concede that they bought their condominium units and became parties to the recreational lease more than four years before commencing suit. They argue, though, that Mangurian's quarterly collection of rent and his increases in the amount of the rent constituted acts that injured plaintiffs and that were committed within four years of commencement of their suit; and that, under *Ze-*

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[15] This rule is, of course, subject to the *Zenith* exception, note 14 *supra.*

nith and *Poster Exchange*, a new cause of action accrued upon the commission of each of these acts.

Defendants argue, and the district court held, that any cause of action plaintiffs might possess accrued when plaintiffs bought their units and became parties to the lease. Defendants' argument, based on the two caveats of *Poster Exchange,* is that the sale of the condominium units and assignments of the lease were the only "acts" committed by either defendant; and that even if the other activities of defendants relied on by plaintiffs were "acts," all the damage to plaintiffs necessarily resulted from the initial, pre-limitations act by Drexel Properties of selling the condominium unit and assigning the lease.[16]

In order to evaluate these competing contentions properly, we find it necessary first to study a series of cases, many of which the parties call to our attention, that apply the principles discussed in *Zenith* and *Poster Exchange* to fact situations more like those here. Then we return to the instant case and apply what we have learned, noting that this case has one twist absent from the others. Our conclusion is that plaintiffs are correct in their contentions.

A. *Similar Cases.* It is apparent that the parties' contentions here present somewhat different problems from those envisioned in *Zenith* and *Poster Exchange,* although the principles underlying decision must remain the same. We therefore turn to a series of cases more like this one, where plaintiff and a defendant entered a contract in the pre-limitations period that continued in force into the limitations period. Cases of this kind can be divided into

[16] The date of the Unit Owners' purchase of their respective units and assumption of obligations under the Lease is the controlling date, for as of that time, the last act was performed by the Developer in connection with completing the transaction and the effect or impact of the transaction as of that time was final.
Brief of Appellees at 6-7.

two categories. First, plaintiff may allege that the contract itself violates the antitrust laws, i.e., is a tying, price-fixing, exclusive dealing, or similar contract. In such cases, plaintiffs (like plaintiffs here) generally argue that a new cause of action accrues to them each time the defendant enforces or collects benefits under the contract within the limitations period. The theory is that each such act committed by the defendant under the authority of the unlawful contract is itself an unlawful act, causing injury to plaintiff; hence, under the general rule of *Zenith,* a new cause of action accrues upon the commission of each such act.

Second, plaintiff may allege that his contract with defendant, whether lawful or unlawful in itself, is being used by a group of defendants as an instrument of an unlawful conspiracy to restrain trade. Again, plaintiffs (like plaintiffs here) generally argue that a new cause of action accrues to them each time the defendant enforces or collects benefits under the contract within the limitations period. The theory is that each time the contracting defendant does so, he commits an overt act pursuant to the conspiracy and injurious to plaintiff; hence, under conspiracy cases like *Zenith* and *Poster Exchange,* a new cause of action accrues upon the commission of each such act.

In both kinds of cases, defendants (like defendants here) generally make one of two arguments, corresponding to our two caveats in *Poster Exchange.* First, they argue that their enforcement of or collection of benefits under the contract are not "acts" at all, so that any injury to plaintiff occurring within the limitations period could only have been caused by defendant's pre-limitations act of executing the contract. Second, they may argue that even if their enforcement or collection of benefits *are* acts, all the injury to plaintiffs necessarily resulted from defendant's pre-limitations act of executing the contract. Under either of these arguments, plaintiff's only cause of action would accrue when the contract was executed, so that plaintiff would

be barred from complaining of defendant's enforcement or collection of benefits under it four years after it was executed.

Although courts' reactions to these kinds of cases have been mixed, we find that the majority, particularly in more recent cases, favors the view that the plaintiff's cause of action in both kinds of cases continues to accrue for as long as the defendant takes advantage of the contract in question. Analyzing the cases in terms drawn from cases like *Zenith* and *Poster Exchange*, these courts feel that the defendant could quit causing the injury of which the plaintiff complains at any time, simply by *not* enforcing or collecting benefits under the contract in question; hence, in *Poster Exchange's* words, the violation is not "final at its impact . . . or . . . by its nature permanent at initiation without further acts." There also seems to be a prevalent opinion that it does not lie well in the mouth of a defendant to argue that he is immunized from suit for his recent acts simply because a pre-limitations contract, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts. To these courts, the important fact seems to be that the defendant must continue to commit these acts in order to continue reaping the fruits of the allegedly unlawful contract or conspiracy.

The case most often relied upon by such courts was decided by the Supreme Court three years before *Zenith*. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) plaintiff, a shoe manufacturer, sued defendant, a manufacturer of shoe machinery, in 1955, charging that defendant had monopolized the shoe machinery industry through its policy of leasing and refusing to sell shoe machinery to plaintiff and others. Plaintiff sought to recover three times the difference between the amount it paid defendant in rental for the shoe machinery in the period during which suit was

not barred by the statute of limitations, and the amount it would have paid if defendant had been willing to sell the machinery during that period. All sides conceded that defendant's lease-only policy was instituted in 1912, and the then-applicable Pennsylvania statute of limitations barred actions that accrued before July 1, 1939.

In the district court the defendant argued that plaintiff was not entitled to recover any damages based on leases entered before July 1, 1939, because the cause of action as to those leases accrued when they were executed. The district court, relying primarily on *Cardinal Films, Inc.* v. *Republic Pictures Corp.*, 148 F.Supp. 156 (S.D.N.Y. 1957), *summarized at* note 21 *infra*, and rejecting *Muskin Shoe Co.* v. *United Shoe Machinery Corp.*, 167 F.Supp. 106 (D. Md. 1958), *discussed infra*, held that plaintiff was entitled to recover damages for payments made to defendant after July 1, 1939 under leases entered before that date. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F.Supp. 258, 294-97 (M.D.Pa. 1965).

In the court of appeals defendant changed its statute of limitations argument, asserting that plaintiff's whole cause of action accrued in 1912, when defendant first refused to sell its machinery. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F.2d 776, 793-95 (3d Cir. 1967) (supplemental opinion). The court of appeals declined to follow cases cited by defendant, *see id* at 794 n. 2, that held the cause of action for a refusal to deal accrues upon the first such refusal, and not upon subsequent refusals. The court first noted that plaintiff sought to recover only those damages inflicted after 1939, and it adopted the district court's method of calculating these damages:

> [T]he specific collection of rentals every month within the statutory period provides a concrete standard for the measurement of the damages which occurred here

within the statutory period by comparing the rentals with the reasonable sales value of the machinery.

Id. at 794. The court then pointed to defendant's collection of rent within the limitations period on leases executed outside the period as an act, in addition to the refusals to deal, injurious to plaintiff, *id.* (emphasis added):

> Finally, in the [cases relied on by defendant] the continuing conduct was that of a mere reassertion of the refusal to deal. Here, however, [defendant] went beyond a mere continuation of the refusal to sell; *it collected rentals on leases* and entered into new leases when old machinery was no longer in working condition and required replacement.

The defendant renewed its statute of limitations arguments in its appeal to the Supreme Court, where they received short shrift:

> [Defendant] has also advanced the argument that because the earliest impact on [plaintiff] of [defendant's] lease only policy occurred in 1912, [plaintiff's] cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected [defendant's] argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. *Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714 (CA 7th Cir. 1956), upon which [defendant] relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on [plaintiff]. Although [plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

392 U.S. at 502, n. 15, 88 S.Ct. at 2236. These comments can be read, we think, as an endorsement of the district court's and court of appeal's positions that the defendant's continued collection of rent within the limitation period on leases executed in the pre-limitations period marked the accrual of successive causes of action.

At any rate, this is how the Seventh and Ninth Circuits have read *Hanover Shoe*. In *Baker* v. *F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821, 91 S.Ct. 42, 27 L.Ed.2d 49 (1970), *aff'g Contract Buyers League* v. *F&F Investment*, 300 F.Supp. 210 (N.D.Ill.1969), plaintiffs, the class of blacks who were buying homes from defendants on installment sales contracts, sued charging that defendants had conspired to exact more onerous contractual terms from plaintiffs than they exacted from white buyers. Among other things, plaintiffs alleged this constituted a conspiracy to fix prices in violation of Section 1 of the Sherman Act. 300 F.Supp. at 216-17.

Defendants' motion to dismiss in the district court was on statute of limitations grounds quite similar to those asserted by defendants here:

> Defendants . . . insist that there can be no relief with respect to any contract that was executed earlier than the limitations period, even if payments were made at a later time still within the applicable period, are still being made, or are required under the contracts to be made for many years to come.

Id. at 219. The district court denied the motion, holding that plaintiffs' cause of action did not stop accruing so long as defendants collected payments under the installment contracts and sought to enforce those contracts. *Id.* at 218-21.[17] The Seventh Circuit, citing note 15 of *Hanover Shoe*, affirmed this holding and stated:

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[17] The district court distinguished *Baldwin* v. *Loew's Inc.*, 312 F.2d 387 (7th Cir. 1963), where plaintiffs had alleged that defend-

> Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of purchasers. . . . Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate. *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231.

420 F.2d at 1200.[18] Thus it is plain that, in the Seventh Circuit's opinion, a defendant's receipt of payments from a plaintiff under a contract that embodies illegally fixed prices, and its attempts to enforce the contract, constitute the commission of acts injurious to the plaintiff; and that

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ants had conspired to coerce them into leasing their motion picture theatre on unfavorable terms to a third party, who was not named as a conspirator. Plaintiffs had executed the lease in the pre-limitations period, but their lessee had exercised an option to renew the lease within the limitations period. The court of appeals held that a new cause of action did not accrue upon the renewal of the lease. 312 F.2d at 390-91.

As the district court pointed out in *Contract Buyers League*, this result was correct because the renewal of the lease in *Baldwin* v. *Loew's Inc.* was not an act *committed by a defendant*. In *Contract Buyers League*, on the other hand,

> Defendants . . . are alleged to have been reaping unlawful benefits through continuing enforcement of their unlawful scheme. Indeed, the best indication of what would be the continuing infliction of injury are [defendants'] efforts to collect on the contracts . . .

300 F.Supp. at 220.

[18] The court of appeals also agreed with the district court's treatment of *Baldwin* v. *Loew's Inc.*, note 17, *supra*. 420 F.2d at 1200.

a new antitrust cause of action accrues from the commission of each such act.[19] Significantly, we cited this portion of *Baker* with approval in *Poster Exchange* as an example of continuing conduct for which antitrust causes of action continue to accrue. 517 F.2d at 127.

In similar fashion, the Ninth Circuit relied on note 15 of *Hanover Shoe* in *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), *rev'g and remanding on other grounds*, 365 F.Supp. 235 (N.D.Cal. 1972). In *Twin City* a predecessor of Finley, the owner of the Oakland athletics baseball team, entered a concession franchise contract in 1950 with the predecessor of Sportsservice. The contract, which was amended in 1954 to provide for a 33 year term, called for the franchise to follow the team and for Sportservice's predecessor to extend credit to Finley's predecessor. In 1967 Finley moved the team to Oakland and in 1968 another concessionaire took over operations at the team's home park.

Sportservice sued Finley for breach of the 1950 contract. Finley counterclaimed, alleging among other things that the 1950 contract constituted a *per se* violation of Section 1 of the Sherman Act because it unlawfully tied the purchase of concession services to the extension of credit. Sportservice pleaded the statute of limitations, arguing "that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete 33-year

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[19] The Seventh Circuit followed *Baker* in *Weber* v. *Consumers Digest, Inc.*, 440 F.2d 729 (7th Cir. 1971). There plaintiff, who executed a covenant not to compete with defendants in the pre-limitations period, sued charging that the covenant was a tool of an unlawful conspiracy by defendants to restrain trade. The court of appeals held that one defendant's suit in state court against plaintiff to enforce the covenant, instituted within the limitations period, was an injurious act against plaintiff for which a new antitrust cause of action, not barred, accrued. *Id.* at 731.

duration in 1954." 512 F.2d at 1270. The Ninth Circuit rejected the argument:

> A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time. . . . [Sportservice's] argument overlooks the necessarily continuing nature of the alleged harm. As the Supreme Court stated in *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968),
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> 'We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . .'

512 F.2d at 1270. Thus the Ninth Circuit has read *Hanover Shoe* to mean that an antitrust cause of action continues to accrue so long as a defendant continues to accept benefits under or assert the validity of an allegedly unlawful tying contract.[20]

A number of district courts also have concluded that a defendant's continued enforcement of or receipt of benefits under a contract with a plaintiff may be injurious acts for which new antitrust causes of action for tying, price-fixing, exclusive dealing, or conspiracy accrue. For instance, in *Lupia* v. *D'Oro Biscuit Co.*, [1974] Trade Reg. Rep. (CCH) ¶ 75,046 (N.D.Ill. 1972), *appeal dismissed* (7th Cir. 1973) (unreported), *cert. denied*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974) plaintiff, a recently terminated

[20] The *Twin City* court went on to hold that the cause of action for an unlawful tying agreement should be dismissed because two separate products were not involved in the alleged tie-in. 512 F.2d at 1276.

franchisee of defendant, sued in 1972 for treble damages, alleging that the distributorship contract between himself and defendant had contained exclusive dealing, territorial restriction, and price-fixing clauses unlawful under Sections 2(a) and 2(c) of the Robinson-Patman Act, Section 1 of the Sherman Act, and Section 3 of the Clayton Act. Defendant moved to dismiss, alleging that the statute of limitations barred the action because the distributorship contract complained of was executed in 1963, nine years before suit was commenced.

Plaintiff, in turn, argued that the injurious acts of the defendant had continued throughout the life of the contract (terminated in 1971), in that defendant had enforced and accepted benefits under the exclusive dealing and price-fixing provisions of the contract throughout that period. The district court, accepting plaintiff's argument, cited *Zenith*, text and notes at notes 13-14 *supra*, for the proposition that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." [1974] Trade Reg.Rep. (CCH) ¶ 75,046, at 96,686. Then, relying on *Baker* v. *F&F Investment*, test and notes at notes 17-19 *supra*, and *Weber* v. *Consumers Digest, Inc.*, note 19 *supra*, the court stated that "in the context of a continuing contractual relationship between plaintiff and defendant analogous to the one we have here, the 'overt acts' continue for as long as the relationship continues." *Id.*

In *Schokbeton Products Corp.* v. *Exposaic Industries, Inc.*, 308 F.Supp. 1366 (N.D.Ga. 1969) Judge Henderson faced a similar problem. In May of 1964 plaintiff and defendant executed a contract by which plaintiff granted defendant a license to use his patented manufacturing process, in return for defendant's agreement to pay plaintiff certain royalties. In April of 1968 plaintiff exercised its contractual right to cancel the contract, and some time after

an unsuccessful demand it sued defendant for royalties claimed to be due under the contract.

Defendant counterclaimed for treble damages, alleging that his contract with plaintiff had contained territorial restrictions and tying agreements unlawful under the antitrust laws. Plaintiff moved to dismiss the counterclaim on the ground that any cause of action plaintiff might possess accrued when the contract was executed, more than four years before suit was commenced. Judge Henderson, quoting note 15 of *Hanover Shoe*, held that defendant's efforts to enforce provisions of the contract within the limitation period were such acts as would cause new causes of action to accrue for plaintiff. 308 F.Supp. at 1367-69. He therefore denied plaintiff's motion to dismiss defendant's counterclaim. In the margin we cite other district court cases that we believe support or are consistent with this position, including two more that were cited with approval in *Poster Exchange, supra.*[21]

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[21] *Aamco Automatic Transmissions, Inc.* v. *Tayloe*, 407 F.Supp. 430, 438 (E.D.Pa.1976) (holding antitrust causes of action by parties to illegal tying contracts, executed more than four years before plaintiffs commenced suit, barred where plaintiffs' payment for tied product *also* was completed more than four years before action was commenced); *Material Handling Industries, Inc.* v. *Eaton Corp.*, 391 F.Supp. 977, 980 (E.D.Va.1975) (alternative holding) (holding antitrust cause of action by party to contract containing illegal tying and territorial provisions, executed more than four years before plaintiff commenced suit, not barred where contract was terminated within four years of commencement of suit); *Monona Shores, Inc.*, v. *United States Steel Corp.*, 374 F.Supp. 930 (D.Minn.1973) (assuming antitrust cause of action by party to contract tying purchase of product to extension of credit, executed more than four years before plaintiff commenced suit, accrued when defendant instituted foreclosure proceedings against plaintiff under credit agreement, also more than four years before plaintiff commenced suit); *Metropolitan Dry Cleaning Machinery Co.* v. *Washex Machinery Corp.*, [1969] Trade Reg.Rep. (CCH) ¶ 72,686, at 86,441 (E.D.N.Y.1968) (holding antitrust cause of action under § 3 of Clayton Act by party to exclusive dealing contract executed more than four years before plaintiff commenced suit, not barred where contract remained in force within four years of commencement of suit); *Roosevelt Raceway, Inc.* v. *Universal Controls, Inc.*, [1965] Trade Reg. Rep. (CCH) ¶ 71,565 (E.D.N.Y. 1965) (holding antitrust cause of action by party to contracts illegal under §§ 1 and 2 of Sherman Act and § 3 of Clayton Act, executed more than four years before plaintiff commenced suit, not barred where contract remained in force within four years of commencement of suit); *Susser* v. *Carvel Corp.*, 206 F.Supp. 636, 651-52 (S.D.N.Y.1962), aff'd. 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1965) (holding antitrust cause of action by parties for price-fixing under franchise contracts, executed more than four years before plaintiffs commenced suit, not barred where defendant abrogated price-maintenance clause within four years of commencement of suit), *cited with approval in Poster Exchange, supra*, 517 F.2d at 127; *Cardinal Films, Inc.* v. *Republic Pictures Corp.*, 148 F.Supp. 156, 159-60 (S.D.N.Y.1957) (holding antitrust cause of action by party to illegal tying contract, executed more than four years before plaintiff commenced suit, not barred where defendant furnished tied product to plaintiff under contract within four years of commencement of suit), *cited with approval in Poster Exchange, supra*, 517 F.2d at 127.

We find the reasoning underlying this line of cases persuasive. The cases are consistent with *Zenith* and *Poster Exchange*, in that accrual of a plaintiff's cause of action is based on injurious acts committed by the defendant within the limitations period. It also seems reasonable to us not to permit a defendant to argue that a suit to recover damages caused by his recent acts is barred because a prelimitations contract between himself and plaintiff, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts. Such defendants hardly are in a position to argue for the protection of the statute of limitations on the traditional ground that " 'evidence has been lost, memories have faded, and witnesses have disappeared,' " *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 544, 94 S.Ct.

756, 762, 38 L.Ed.2d 713 (1974), *Quoting Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 348-49, 64 S.Ct. 582, 88 L.Ed. 788 (1944), when it is the defendants' own recent conduct that results in a finding of a newly accruing cause of action. *See Hanover Shoe, supra,* 392 U.S. at 502 n. 15, 88 S.Ct. 2224.

The defendants in this case place primary reliance on *Muskin Shoe Co.* v. *United Shoe Machinery Corp.,* 167 F. Supp. 106 (D.Md. 1958); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.,* 193 F.Supp. 401 (S.D.N.Y.1961), and *Steiner* v. *20th Century-Fox Film Corp.,* 232 F.2d 190 (9th Cir. 1956) to support the proposition that, in cases of the kind under discussion here, a plaintiff's only cause of action accrues when he executes the contract of which he complains, and not when defendants commit acts under the contract's authority. We do not find these cases compelling. In *Muskin Shoe* another plaintiff sued the same defendant as in *Hanover Shoe, supra,* alleging the same conduct. As in *Hanover Shoe,* defendant argued that plaintiff's causes of action accrued when plaintiff entered the leases in question, and not when plaintiff made payments under the leases. Although the district court accepted this argument in *Muskin Shoe,* 167 F.Supp. at 111-12, both the district court and the court of appeals in *Hanover Shoe* expressly refused to follow its holding. 245 F.Supp. at 295-96; 377 F.2d at 794 n. 3. We therefore view the Supreme Court's affirmance on the statute of limitations question in *Hanover Shoe* as undermining the persuasiveness of *Muskin Shoe.*

Skouras Theatres held that the antitrust conspiracy cause of action of plaintiffs, who had entered allegedly unlawful pooling agreements with defendants, accrued when plaintiffs executed the pooling contracts, and not when defendants committed subsequent injurious acts pursuant to the agreements:

> The injury was inflicted when the agreement was made and the consequent overt acts resulting from the agreement were merely damages which flowed from the original agreement.

193 F.Supp. at 406. As should be clear by now, however, we cannot accept the position that injurious acts committed against a plaintiff by a defendant are immunized from suit simply because an allegedly unlawful pre-limitations contract purports to authorize the commission of such acts. We therefore reject the holding of *Skouras Theatres.*

In *Steiner* plaintiff leased her movie theater to one of the defendants in the pre-limitations period; the term of the lease extended into the limitations period. Plaintiff's allegation was that that defendant and other defendants had conspired to monopolize the first-run motion picture industry and that, in doing so, they had forced her to lease the theater on less favorable terms than she otherwise would have received. Plaintiff alleged that the execution of the lease was an overt act pursuant to the conspiracy injurious to her, and that defendants' closing of the theater within the limitations period also was. The Ninth Circuit held that plaintiff was barred from suing for damages resulting from the execution of the lease, but not from suing for damages resulting from closing of the theater. 232 F.2d at 194-95, 198. That court was not asked to decide, nor need we, whether defendant's payment of rental to plaintiff under the lease within the statutory period constituted acts that could be said to have damaged plaintiff. What we do know is that the Ninth Circuit would not view the fact that the leases were executed outside the statutory period as barring suit for injurious acts committed under them within the period. *See Twin City Sportservice, supra.*[22]

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[22] We likewise decline to follow these cases that defendants might have cited, but did not: *Landon* v. *Twentieth Century-Fox Film Corp.,* 384 F.Supp. 450, 458 (S.D.N.Y.1974), (alternative holding)

B. *This Case.* Although the parties might expect that what we have said thus far is conclusive on the question here, we detect one further twist in this case which is absent from the cases reviewed above. The typical form of tying agreement is one whereby plaintiff agrees with a single defendant to buy both "A" (the tying product) and "B" (the tied product) from that defendant. Under our analysis above, in such a case the defendant's collection of payment for "B" under the agreement within the limitations period would cause new causes of action to accrue for plaintiff even if the tying contract itself was executed in the pre-limitations period.

In the instant case, the alleged tying agreement takes a slightly different form. The agreement between Drexel

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(holding that cause of action for allegedly unlawful tying agreement, the sale of plaintiff to defendant in 1944 of copyright together with renewal right, accrued in 1944 and not in 1972, when defendant exercised renewal right; states, "As a general rule, claims based on anti-competitive agreements to which the plaintiff is a party accrue at the time of their execution."); *Fleischer* v. *A.A.P., Inc.*, 180 F.Supp. 717, 723-24 (S.D.N.Y.1959), *aff'd on other grounds*, 329 F.2d 424 (2d Cir. 1964) holding cause of action for antitrust conspiracy, relying on overt acts committed within limitations period by defendant pursuant to contract between plaintiff and defendant executed outside limitations period, barred by statute of limitations); *Sandidge* v. *Rogers*, 167 F.Supp. 553, 557-58 (S.D.Ind.1958) (holding cause of action for antitrust action for antitrust conspiracy, relying on defendant's exercise of option to renew lease of land from plaintiff within limitations period where original lease was executed outside limitations period, barred by statute of limitations); *cf. Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F.Supp. 589, 592-94 (D.N.J.1957), *aff'd on other grounds*, 307 F.2d 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929, 83 S.Ct. 872, 9 L.Ed.2d 733 (1963) (holding antitrust cause of action for exclusion of plaintiff from United States drug market, relying on unlawful contract of sale of trademarks and patents executed in pre-limitations period by plaintiff's predecessor, barred by statute of limitations because plaintiff alleged no overt acts of exclusion by defendants within limitations period).

Properties and plaintiffs is that if plaintiffs want to buy "A" (the condominiums) from Drexel Properties, they must agree to buy "B" (the lease) from Mangurian, who is president and sole stockholder of Drexel Properties. Mangurian, it should be noted, is not alleged to be a party to the tying agreements themselves, but only to the lease. From this, defendants might argue (although they do not) that Mangurian is an innocent third party to the alleged tying agreements, who is enforcing and collecting benefits under the lease *and not the tying agreements.* Thus, they might conclude, under our own analysis Drexel Properties cannot be sued on the tying agreements because it has committed no act under the agreements within four years of suit, and Mangurian cannot be sued because he has not either.

This argument, however, would prove too much. It would imply that Mangurian could not be held liable on account of the tying agreements *at all,* because he was not a party to them and does not act under them. Such is not the law. While the more common form of tying agreement is one whereby plaintiff agrees with a single defendant to buy both "A" and "B" from that defendant, the form we see alleged here—where plaintiff, by a contract with one defendant, is required to buy the tied product from a legally separate but either controlled or controlling defendant—also is condemned by the antitrust laws. In such cases, if the tying agreement itself is found to be unlawful, then *both* the seller of the tying product (who is a party to the tying agreement) *and* the seller of the tied product (who is not a party to the tying agreement itself) may be held liable *as members of a conspiracy to restrain trade by means of the tying agreement. See, e.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d

982 (1968).[23] And in such cases, it is plain that the defendant who sells the tied product, but who is not a party to the tying contract itself, commits overt acts in furtherance of the conspiracy whenever he collects payment for the tied product from the plaintiff. Indeed, such collections are the very goal of such a conspiracy. Hence, under *Zenith* and *Poster Exchange*, a new cause of action for conspiracy should accrue upon the commission of each such act of collection.[24]

In the instant case, plaintiffs have alleged just this kind of conspiracy, together with Mangurian's acts of collection for the tied product. It is immaterial that these acts are sanctioned by the lease, which on its face is lawful; for the essence of the complaint is that Mangurian conspired with Drexel Properties to force plaintiffs, by means of an unlawful tying agreement, to become parties to the lease, and hence bound to pay Mangurian for the tied product. Plaintiffs here thus are in a position very similar to that of the plaintiffs in *Baker* v. *F&F Investment*, *supra*, who complained of

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[23] In addition, the Supreme Court recently has suggested that in such cases the two entities' "common ownership and control [may] make it appropriate to regard the two as a single seller." *United States Steel Corp.* v. *Fortner Enterprises, Inc. (Fortner II)*, —— U.S. ——, ——, 97 S.Ct. 861, 864, 50 L.Ed.2d —— (1977). If this view is taken, the result in this case remains the same. *See* Part III.A. *supra*; note 24 *infra*.

[24] It will be noted that this conclusion parallels the one we have posited in the more conventional one-defendant tying case. In the two-defendant case, as in the one-defendant case, it is necessary to collect from plaintiff for the tied product in order to reap the intended benefits of the tying agreement. In the two-defendant case, as in the one-defendant case, continued collection results in continuing accrual of the plaintiff's cause of action. Thus, a defendant cannot escape suit via the statute of limitations by splitting itself into two separate legal entities and causing one of them to force plaintiff to buy the tied product from the other one.

> a conspiracy among defendants, the object of which was establishment of a continuing relationship with individual plaintiffs.

420 F.2d at 1200. The lease here, like the installment sales contracts in *Baker* v. *F&F Investment*, is alleged to be the facially lawful product of an unlawful conspiracy between defendants. Here as there, collections under that contract are acts in furtherance of the alleged conspiracy behind it. We therefore hold that so long as Mangurian continues to collect rent from these plaintiffs under the lease, plaintiffs' causes of action for the conspiracy continue to accrue.

IV. Postscript

One final word is in order. The court below thought that a holding for plaintiffs here "would not encourage the vigorous enforcement of the antitrust laws through private actions" because "any plaintiff could sit on his rights, allowing damages to accumulate" through the term of the lease. 407 F.Supp. at 872. As even defendants concede, this fear is without foundation; for we adhere to the rule that plaintiffs may sue only for damages that result from acts committed by the defendants within the four years preceding commencement of suit. That means that these plaintiffs now are barred from seeking rentals collected by Mangurian before that time. Under our holding, it still would have been to plaintiffs' advantage to have sued at the earliest possible moment. The fact that they did not, however, does not bar this suit.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
S. D. FLORIDA

No. Fl 75-09-Civ-JLK.

IMPERIAL POINT COLONNADES CONDOMINIUM, INC., etc.,
Plaintiffs,

v.

Harry T. MANGURIAN, Jr., et ux, et al.,
Defendants.

Feb. 13, 1976

Order Granting Summary Judgment

JAMES LAWRENCE KING, District Judge.

This cause came on for consideration upon the defendants' motion for summary judgment. The court, having considered the record and being fully advised in the premises, finds and concludes that the motion should be granted.

Plaintiffs are unit owners in a condominium developed by the defendants. At the time each purchased his or her condominium, each was required to enter into a 99 year lease for recreational facilities. Payment due under this lease could be adjusted to reflect fluctuations in the cost of living. It is undisputed that assignment of a 1/552 interest in the lease was made to Clayton P. Thompson on July 28, 1970, and the assignment of 1/552 interest in the lease was made to William M. Wyant and Virginia Wyant on May 28, 1969, and that these are the only two plaintiffs left in the action. It is alleged that the coupling of the recreation lease with the sale of the condominium unit constitutes an illegal tying arrangement in violation of both the Clayton Act and the Sherman Act.

Defendants move for summary judgment, contending that the four year limitation period of 15 U.S.C. § 15b bars the present action. At issue is whether the defendants' enforcement of the lease constitutes a continuing violation of the antitrust laws and so exempts the cause from the limitation period. Defendants submit that any effect that the disputed leases might have had was final on the date said leases were entered into. Given the nature of the violation alleged, the court agrees.

This decision is controlled by the applicable Fifth Circuit and Supreme Court authority. The principle of a continuing violation is set forth in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed. 2d 1231 (1968). In that case United had a policy of leasing rather than selling its more complicated machinery. This continued refusal to sell helped United in its monopolization of the shoe machinery market. United argued that because the first refusal to sell was in 1912, the action was barred by the Statute of Limitations. The Supreme Court found that the Court of Appeals had correctly decided the question. The Third Circuit held that, even though the first refusal to deal occurred outside the limitations period, damages could be had for reiterations of such a refusal to deal within the statutory period. *Hanover Shoe* v. *United Shoe Machinery Corp.*, 377 F.2d 776, 794-795 (3d Cir. 1967). In approving this decision, the Supreme Court stated, "we are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span . . . (r)ather we are dealing with conduct which constituted a continuing violation of the Sherman Act". 392 U.S. 502, at 15, 88 S.Ct. at 2236. Thus the "continuing violation" was predicated on a finding of a continuous course of conduct by United consisting of repeated refusals to sell. There was not an isolated incident, but separate invasions of Hanover's rights occurring both within and without the statutory period. 377 F.2d 795.

The case at bar presents a different situation. Here there was one isolated transaction by the defendants. Each unit owner, upon purchase, took an assignment of interest in the recreation lease. All parties were apprised of all conditions at that point. No new leases, purchases, or contracts have been entered into since that time by these plaintiffs. Given these facts, whatever violation might have occurred, occurred at a specific time.

The issue has been recently discussed in the case of *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), where the Fifth Circuit made it clear that it was possible to assert a continuing antitrust violation based on a course of conduct. The court specifically was interested in the *defendant's conduct*, and not the plaintiff's harm, in considering whether the violation was "final at its impact". *Id.* at 126. Where the actionable wrong was "by its nature permanent at initiation" suit must be brought within the four year period. *Id.* Once again the emphasis was on repetitive acts which constituted new violations within the statutory period.

Plaintiffs have alleged an illegal tying arrangement. The tie-in, if it occurred, was the assignment of the lease. No party has alleged that it was required to take a new assignment and so make a new "purchase" within the statutory period. The purported violation was then "final at its impact" and "permanent at its initiation" because no further act by the defendants was necessary to inflict the damage here complained of. Whatever cause of action these plaintiffs might have had, accrued at the signing of the lease, and the limitations period began to run at that time. The positions of the parties have not changed.

Plaintiffs submit that the defendants continued enforcement of the provisions of the lease are "acts" and established a course of conduct. The court does not agree. The fact that these plaintiffs are still obligated to pay rent pursuant to an action taken five and six years ago, respectively, is

merely the "abatable but unabated inertial consequences of some pre-limitations action." *Poster Exchange, Inc.* v. *National Screen Service Corp., supra,* at 128. There has been no injurious act by the defendants within the limitations period upon which to base a charge of an illegal tying arrangement.

The court notes that to hold otherwise would not encourage the vigorous enforcement of the antitrust laws through private actions. If it were held that these plaintiffs had 99 years to assert their claims, then any plaintiff could sit on his rights, allowing damages to accumulate. Given the provision for treble damages in antitrust actions, this would indeed be a tempting proposition.

Plaintiff knew on the date they purchased their units that they were also entering into a recreation lease. The statutes gave them four years to assert the claims that they now bring before this court. They failed to question the validity of the arrangement within the statutory period and so their claims must be foreclosed due to their own inaction. Accordingly, it is

Ordered and adjudged that the defendants' motion for summary judgment be and the same is hereby granted.

CORRECTED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-151

HARRY T. MANGURIAN, JR. and DOROTHY MANGURIAN, his wife, and DREXEL PROPERTIES, INC., a Florida corporation,

Petitioners,

v.

CLAYTON P. THOMPSON, WILLIAM M. WYANT, and VIRGINIA WYANT, his wife, individually and on behalf of all others similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENIAL OF THE WRIT

A.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO DEMONSTRATE CONFLICT WITH OTHER COURTS OF APPEAL WITH RESPECT TO THE APPLICATION OF 15 U.S.C. §15 (b).

Petitioners seek to invoke the jurisdiction of this Court alleging that the decision of the Court below is in conflict with the decision of the Sixth Circuit in *Akron Presform Mold Co. vs. McNeil Corporation*, 496 F.2d 230 (6th Cir. 1974), cert. den. 419 U.S. 997 (1974), and is in conflict with the decision of the Ninth Circuit in *Steiner vs. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

An analysis of the above decisions fail to demonstrate conflict. With respect to the decision of the Sixth Circuit in *Akron*, supra, the Plaintiffs in that cause pled and attempted to prove an avoidance of the Statute of Limitations on two (2) specific grounds. Those grounds were: (a) speculative damages occurring within the period of limitations and resulting from conduct occurring beyond the period of limitations; and (b) fraudulent concealment by the Defendants which resulted in the Plaintiffs being caused to suffer an expiration of the time requirements of the subject limitations period. The decision of the Sixth Circuit is replete with language which clearly indicates that Plaintiffs pled those exceptions specifically, relied upon them specifically, and failed to provide evidence to support those allegations to avoid the Statute of Limitations. The Plaintiffs in *Akron*, supra, did *not* plead the continuing violation theory, nor did they attempt to prove it. Accordingly, there

can be no conflict between the decision of the Sixth Circuit in *Akron* and the decision below in the instant cause. The lack of conflict can be clearly seen in the following quotations from the decision of the Sixth Circuit in *Akron:*

> Since the complaints in the present action were filed on July 3, 1968, the first question is whether any injurious overt act has occurred since July 3, 1964. Presform admitted to the Trial Court that all acts commencing the alleged unlawful conspiracies began more than four years before the filing of the complaints in these actions, but contended that its anti-trust claims were not barred because its claims fell within the *Zenith* and fraudulent concealment exceptions of the application of the Statute of Limitations. The burden thus shifted to Presform to prove that the operation of the Statute could be avoided by either exception. *Akron Presform Mold Co. vs. McNeil Corporation*, supra, at page 233. . . .
>
> Without reaching the merits of Presform's claims we hold that the District Court did not err in dismissing Presform's actions as barred by the Statute of Limitations. Presform allowed its claims to slumber. Evidence has faded and witnesses may have disappeared. Since neither the *Zenith* exception nor the fraudulent concealment exception tolled the Statute in this case, it was entirely consistent with the purposes of the Statute of Limitations for the District Court to determine that the Appellees should be free of Presform's stale claims. *Akron*, supra, at page 234.

Unlike the Plaintiffs in *Akron*, Plaintiffs, Respondents herein, pled and made a prima facie showing of a continuing violation exception to the application of the Statute of

Limitations, as recognized in the numerous authorities as cited within the decision of the Court below. There is no conflict between the decision of the Fifth and Sixth Circuits. It is also important to note that the Sixth Circuit cited in *Akron*, supra, the case of *Baker vs. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970). Although cited on other grounds in *Akron*, supra, the Court below also relied on *Baker*, supra, reflecting the lack of conflict alleged to be existent herein.

In reliance upon *Steiner*, supra, Petitioners attempt to create conflict between an outdated and inapplicable decision. The decision of the Court below in this cause is wholly consistent with the later decisions of the Ninth Circuit in *Hoopes vs. Union Oil Co. of California*, 374 F.2d 480 (9th Cir. 1967), and *Twin City Sports Service, Inc. vs. Charles O. Finley, Inc.*, 512 F.2d 1264 (9th Cir. 1975). In *Hoopes*, supra, a decision rendered eleven (11) years after *Steiner*, supra, the Ninth Circuit clearly held that entry into a contract that included an exclusive dealing provision was not considered the last overt act for the purposes of determining when the Statute of Limitations begins to run, but the continued enforcement of the contract by the Defendant constituted overt acts in furtherance of the conspiracy, even though those acts directly flowed from the contract, were provided for within the contract, and were not acts independent of the contract which formed the basis of the alleged violation.

Consistent with their decision in *Hoopes*, supra, the Ninth Circuit in *Twin City Sports Service, Inc.*, supra, held that the action was not barred by the Statute of Limitations, even though the last amendment or extension of the contract which formed the basis of the alleged violations was entered into in 1954, and the action was not filed until

1968. Again, the acts complained of flowed directly from the contract and were provided by the contract, as opposed to being acts independent of the contract. Supreme Court Justice Clark, sitting by designation, considered a contract of thirty-three (33) years, and summarily rejected the argument that the Statute of Limitations began to run at the time that the contract was executed, and further rejected the argument that the date of the last amendment or extension of the contract operated as a last overt act in furtherance of the conspiracy for the purposes of determining when the Statute of Limitations begins to run. The following language from the decision of the Ninth Circuit in *Twin City Sports Service, Inc.*, supra, is relevant to show the lack of conflict between the decisional law of the Ninth Circuit on this issue and the case before this Court:

> Sports Service argues that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete thirty-three year duration in 1954. This argument overlooks the necessarily continuing nature of the alleged harm . . .
>
> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act, and which inflicted continuing and accumulating harm . . . Thus, the fact that the final amendment to the contract was made in 1954 does not preclude Finley from bringing suit in 1968. To hold otherwise is to say that some damage that might have been sustained was barred before it accrued.

Apparently Petitioners have recognized that there may be some difficulty in demonstrating conflict between the decision below and the decisions of the Sixth and Ninth Circuits, because they have gone beyond Rule 19 of this Court and have attempted to establish that there is conflict based upon decisions of the District Courts of New York. Not only do the various trial court decisions cited by Petitioners in their Petition fail to reflect conflict, assuming for the moment that a conflict existed, that would not be conflict sufficient to invoke the jurisdiction of this Court pursuant to Rule 19.

As can be seen by the above-described discussion, Petitioners have failed to establish conflict as interpreted by this Court under Rule 19 sufficient to invoke the jurisdiction of this Court. The Supreme Court of the United States has consistently determined what is conflict for the purpose of invoking its jurisdiction. *U.S. vs. Muniz*, 374 U.S. 150 (1963); *Rice vs. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955); *U.S. vs. Zack*, 375 U.S. 59 (1963); *Bingler vs. Johnson*, 394 U.S. 741 (1969). Each of those cases, as will be briefly discussed below, reflected a direct conflict on an important federal question between various Courts of Appeal which compelled the Court to invoke its discretionary jurisdiction to resolve that conflict.

In *U.S. vs. Muniz*, supra, the question concerned whether a prisoner may bring a claim under the Federal Tort Claims Act for injuries suffered resulting from the negligence of Federal employees. Certiorari was granted because of the importance of the federal question, and two (2) Courts of Appeal had expressly said that such a claim could not be brought, but the Second Circuit determined that such a claim could be brought. Thus, the direct conflict, and the important federal question being existent, jurisdiction was invoked to resolve the conflict.

In *Rice vs. Sioux City*, supra, this Court first granted certiorari, and proceeded to determine the case. Upon rehearing, the Court realized that the conflict which had been apparent was not existent, the importance of the question was not significant enough for a decision, and vacated its order and dismissed the Petition for Writ of Certiorari. In so holding, the Court clearly stated that certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties to the cause, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. Such is not the case here.

U.S. vs. Zack, supra, concerned an action to recover certain tax refunds. Jurisdiction was invoked because of the recurring importance of the problem in the administration of the tax laws, and a direct conflict between the decision below of the Court of Claims and certain Courts of Appeal decisions. The conflict was direct, in that certain decisions held that the refund was proper, and others said that the refund could not be made on the direct question involved.

Similarly, in *Bingler vs. Johnson*, supra, there was a direct conflict between the decision of the Third Circuit which held that Section 117 of the Internal Revenue Code of 1954 was invalid, in that the Fourth, Sixth and Tenth Circuits had previously expressly upheld the validity of Section 117 of the Internal Revenue Code of 1954, and there had been no prior Supreme Court review of any of those decisions.

Petitioners, having failed to demonstrate direct conflict, or any conflict whatsoever, should not receive the discretionary review of this Court, and their Petition should be denied.

B.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO DEMONSTRATE A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW SUFFICIENT TO CONFER JURISDICTION UNDER RULE 19 OF THIS COURT.

Having failed to demonstrate conflict, Petitioners then switch over to the next futile attempt to establish an important federal question pursuant to Rule 19 of this Court. This Court, in deciding *Rice vs. Sioux City Memorial Parks Cemetery*, supra, has discussed this question, and that language should be reviewed at this time:

> A federal question raised by a Petitioner may be 'of substance' in the sense that: abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citing cases). *Rice vs. Sioux City*, at page 616.

Rice vs. Sioux City, supra, also lists the cases of this Court wherein cases so numerous that they need not be again recited herein were rejected on the federal question argument identical to the one advocated by Petitioners herein.

The lack of a substantial federal question can perhaps best be seen in the argument of Petitioners themselves. Petitioners argue at page 14 of their Petition that the Court below has interpreted a federal statute contrary to the intent of the Congress, and at page 15 state that they have done so because they have made the Statute of Limitations a mere measure of damages. Their support for this statement is the reliance of the Fifth Circuit on the Rule that the Plaintiffs may sue only for damages that result from acts committed by the Defendants within the four (4) years preceding commencement of the suit. This is the rule promulgated by this Court, adopted by this Court, and recognized as the leading authority on the continuing violation theory subsequent to its rendition, that case being *Hanover Shoe, Inc. vs. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Petitioners then begin to speculate as to a potential litigation flood gate concerning all kinds of contractual rights, which should not and could not be considered by this Court. The Petitioners have failed to completely establish the existence of an important federal question not previously answered by this Court. In fact, the question has been answered by this Court, as the decision of the Fifth Circuit in the instant cause relies heavily on prior decisions of this Court, and is totally consistent with all Courts of Appeal who have decided the question, which is reflected directly in the decision of the Fifth Circuit. The decision of the Fifth Circuit is exhaustive as to the interpretations of 15 U.S.C. §15(b) of the other Courts of Appeal who have decided the question, and is careful in aligning its decision so that it would be consistent with the other Courts of Appeal, as well as this Court. Petitioners therefore would have this Court invoke its discretionary review based upon *speculative, non-existent* potential litigation.

Petitioners, having failed to establish an important federal question within the meaning of Rule 19 of this Court, should not be entitled to review of the decision below, and their Petition should be denied.

C.

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE NEAREST APPLICABLE DECISIONS OF THE SUPREME COURT.

Finally, out of desperation, Petitioners attempt to demonstrate that the decision of the Court below misconstrues and misapplies the decisions of this Court in *Zenith Radio Corp. vs. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *Hanover Shoe, Inc. vs. United Shoe Machinery Corp.*, supra. This argument is yet another indication, fatal to Petitioners' position, in their quest for discretionary review by this Court.

An analysis of the decision of the Fifth Circuit below reveals that the Fifth Circuit unquestionably read, analyzed and applied the two (2) decisions of this Court with extreme care, to be consistent not only with the decisions of this Court, but to be consistent with the decisions of the other Courts of Appeal who had considered and decided similar questions relative to the application of 15 U.S.C. §15(b) and the continuing violation theory.

Having failed to demonstrate conflict between the Court below and the decisions of this Court on related issues, Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above and foregoing reasons, it is readily apparent that the decision sought to be reviewed herein is wholly consistent with the decisions of all Courts of Appeal who have previously decided similar questions, is consistent with the decisions of this Court applying 15 U.S.C. §15(b), and that no substantial federal question has been brought before this Court pursuant to the provisions of Rule 19 of this Court's Rules. Accordingly, the Petition for Writ of Certiorari to review the decision of the United States Court of Appeal for the Fifth Circuit should be denied.

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies, pursuant to Rule 33(1) that true and correct copies of the foregoing Respondents' Brief in Opposition to Petition for a Writ of Certiorari, filed on behalf of Respondents, was served by mail, this 8th day of September 1977, upon the following:

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By /s/JEFFREY E. STREITFELD
Jeffrey E. Streitfeld

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-151

HARRY T. MANGURIAN, JR. and DOROTHY MANGURIAN, his wife, and DREXEL PROPERTIES, INC., a Florida corporation, *Petitioners*,

v.

CLAYTON P. THOMPSON, WILLIAM M. WYANT, and VIRGINIA WYANT, his wife, individually and on behalf of all others similarly situated, *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners file this brief, limited to arguments first raised in the brief in opposition to their petition for a writ of certiorari, pursuant to Rule 24(4) of the Rules of this Court.

I. CONTRARY TO THEIR ASSERTION, RESPONDENTS HAVE NOT MADE A PRIMA FACIE CASE SHOWING A CONTINUING VIOLATION.

Respondents, contrary to their assertion in their Brief in Opposition (at page 3), have not pled and made a prima facie case showing a continuing violation of the Federal Antitrust Laws. True, Respondents allege a continuing conspiracy in restraint of trade (Paragraph 15 of Complaint), but in support of such conclusitory assertion only allege the enforcement of the Lease. Petitioners contend that, contrary to the holding of the Court of Appeals in the instant case, the mere enforcement of a legal lease, without more, is not a continuing violation giving rise to new causes of action which start the Statute of Limitations running anew.

Petitioners, of course, recognize that a lease may be the means of a continuing violation of the Sherman Act if the lease is used as an instrument for the exercise and maintenance of monopoly power, as were the leases in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). However, there was no assertion in the instant case that Petitioners, either alone or with others, were in any way attempting to monopolize the recreational market — nor could there be.

The failure of Respondents to make a prima facie case showing a continuing violation by Petitioners is fatal to their arguments which are based upon such an assumption.

II. THE ATTEMPT BY RESPONDENTS TO RECONCILE THE DECISIONS OF THE VARIOUS CIRCUITS IS NOT SUPPORTED BY THE FACTS REPORTED IN THE OPINIONS IN SUCH CASES.

In *Akron Presform Mold Company* v. *McNeil Corporation*, 496 F.2d 230 (6th Cir. 1974), plaintiff had asserted a continuing violation, i.e., enforcing an injunction (at page 232). The court in that case, however, did not consider this as an "overt act" which would start the Statute of Limitations running anew. The case is therefore entirely consistent with previous holdings of the Sixth Circuit on the matter here at issue and in conflict with the holding of the Fifth Circuit in the instant case.

Likewise, *Hoopes* v. *Union Oil Co. of Califonia*, 374 F.2d 480 (9th Cir. 1967), does not demonstrate, as urged by Respondents, that the Ninth Circuit had overruled its former decision in *Steiner v. 20th Century-Fox Film Corporation*, 232 F.2d 190 (9th Cir. 1956). In fact, the Ninth Circuit cited *Steiner* in *Hoopes* as an authority for its holding (at page 486). As noted under Point I of this Brief, the enforcement of a lease is not a continuing violation of the Sherman Act unless the lease is used as an instrument for the maintenance of monopoly power. The "lease-leaseback" agreement in the *Hoopes* case was alleged to be one of numerous similar such agreements used as a means to foreclose competition in the gasoline products market in violation of the antitrust laws (at page 484). If a lease or other contractual agreement is so used, enforcement of such lease or agreement is, as shown by the *Hanover Shoe* case, *supra*, a continuing violation.

Respondents' contention that *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), also showed an overruling of the Ninth Circuit's decision in the *Steiner* case is based, as was the Fifth Circuit's statement of the case, upon an inaccurate and misleading analysis of the case.

In its opinion, the Fifth Circuit cites the fact that Finley alleged, among other things, that the 1950 contract constituted a per se violation of Section 1 of the Sherman Act because it unlawfully tied the purchase of concession services to the extension of credit. It goes on to state that Sportservice pleaded the Statute of

Limitations and that the Ninth Circuit rejected the argument on the basis of footnote 15 in the *Hanover Shoe* case, *supra*, which it quotes (at page 1270). The Ninth Circuit did no such thing. It rejected this allegation and all the other allegations of violations of the Sherman Act on the grounds that the district court had erred in deciding what was the applicable market involved in the case. It determined that the relevant market was not the concession products market, as the district court had found, but rather the franchise market. Accordingly, practically the entire opinion deals with the effect of this conclusion on the various violations of the Sherman Act alleged by the plaintiff. In discussing the alleged illegal tying agreement, the court stated: "Our decision to reverse and remand the judgment of the trial court for the purpose of fixing the relevant franchise market makes it necessary that we consider the trial court's conclusion that Sportservice is guilty of a *per se* violation of Sec. 1 of the Sherman Act..." at page 1275). It then discussed the alleged tying agreement in the light of the relevant market, i.e., the franchise market, and concluded that "(t)he seller-borrower's monopoly power may induce such a loan; but that does not warrant the transformation of the purchaser-lender into a seller of two commodities, cash payments and a favorable loan, for the purpose of charging such purchaser-lender with Sherman Act violations." (at page 1276) Since the Ninth Circuit determined that there was no illegal tying agreement, its initial discussion of whether Finley's antitrust claims were barred by limitations does not pertain to that particular violation. The court's discussion of the Statute of Limitations was, therefore, limited to the other alleged violations and concluded that, if the facts in the case sustained such allegations, the statute would be tolled on the grounds that "(t)o hold otherwise is to say that some damage that might have been sustained was barred before it accrued." (at page 1270)

As regards Respondents' contention that the Second Circuit decisions were merely those of the district court in that circuit, Petitioners point to the fact that, while they found no *opinions* discussing the point at the Court of Appeals level, at least one recent decision of a district court had been upheld by the Court of Appeals for the Second Circuit, *Korn* v. *Merrill*, 403 F. Supp. 377 (S.D.N.Y. 1975), *aff'd* 538 F.2d 310 (2nd Cir. 1976), and thus became the *decision* of the Court of Appeals. Respondents appear to be confusing "opinions" with "decisions". Furthermore, the numerous decisions of the district courts in the Second Circuit are all in opposition to those of the Fifth Circuit in the present case.

Baker v. *F & F Investment*, 420 F.2d 1191 (7th Cir. 1970), referred to by Respondents and relied upon by the Court of Appeals for the Fifth Circuit, is concededly in conflict with the decisions of the Second, Sixth and Ninth Circuits. However, insofar as the court purported to include within its opinion a decision on the Statute of Limitations with respect to a violation of Section 1 of the Sherman Act, the court, in *Baker*, was in error.

The complaint in the *Baker* case involved a violation of the Federal Civil Rights Act, although violations of the Federal and State antitrust acts were also alleged. The plaintiffs, who were black, alleged that the defendants had conspired to sell them homes at higher prices and by means of installment sales contracts containing more onerous contractual terms than were exacted from white buyers. The plaintiffs alleged that this constituted a conspiracy to fix prices in violation of the Federal Civil Rights Act and the Federal and State antitrust acts. The Court of Appeals, in its opinion, stated that the plaintiffs "have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing violation of the

rights of purchasers." (at page 1200) The Court of Appeals then concluded that, because of the continuing nature of the overt acts alleged (the collection of installment payments), the Statute of Limitations did not commence to run when the contracts were executed, but when they were terminated.

As authority for this conclusion, the Seventh Circuit first relied (at page 1200) on its own opinion in the *Zenith* case[1] where the court had held that the limitations period commenced to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-(limitation) period acts occurring in the damage period."[2] It should be noted, however, that the Seventh Circuit's statement in the *Zenith* case was made in the context of a continuing conspiracy by defendants to monopolize a foreign market by excluding plaintiff from its patent pool arrangement in such market. The refusal to deal with the plaintiff in that case was the original "overt" act, and since plaintiff did not show any further act of refusal, the Statute of Limitations accrued from the date of the first refusal to deal. This Court, on certiorari, 401 U.S. 321 (1971), agreed with the Seventh Circuit's analysis of the last overt act, but held that if, during the limitations period, the damages flowing from such act were too speculative to be ascertained, then the statute was tolled until such damages could be ascertained. (Note, however, that this was a tolling of the statute, not a change of the definition of overt act.) In the *Baker* case, the alleged antitrust violation was price fixing. For such an allegation to constitute a violation of Section 1 of the Sherman Act, it is necessary to first demonstrate monopoly power. As stated in the *Twin City* case, *supra*, (at page 1270) "(m)onopoly power is the power to control prices or exclude competition." See also cases cited therein. There is no allegation in the *Baker* case that the defendants had monopoly power in the housing market for blacks in Chicago. Without such power, there could be no price fixing violation under Section 1 of the Sherman Act.

[1]418 F.2d 21 (7th Cir. 1969)

[2]*Id.* at 25

The Seventh Circuit then went on to cite the *Hanover Shoe* case as authority for its conclusion that "(b)ecause of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate." (at page 1200) The overt acts were the collection of installment payments under the contract. However, as noted previously, this Court in the *Hanover Shoe* case found that the leases themselves were violations of the antitrust act because they maintained a monopoly. On that basis, this Court determined that the collection of rent under such leases was "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover." (at page 502, n.15) Since there was no allegation of monopoly power in the *Baker* case, the principle of "continuing violation" enunciated in the *Hanover Shoe* case is not applicable to the facts in the *Baker* case. The Seventh Circuit, in attempting to bridge this gap, devised the term "continuing relationship" (at page 1200) for the language "conduct which constituted a continuing violation" used in the *Hanover Shoe* case. However, a "continuing relationship" is not synonymous with a "continuing violation" unless it is predicated on monopolistic duress, i.e., unless the collection of rents or installment payments is the exercise of monopoly power, an element which is lacking in the *Baker* case. From the foregoing, it can readily be seen that the Seventh Circuit's reliance on the *Zenith* and *Hanover Shoe* cases as authorities for its conclusion is patently unsupportable.

The Petitioners, therefore, respectfully submit that there is a direct conflict among the various Circuit

Courts on the interpretation to be placed upon 15 U.S.C. Sec. 15b sufficient to invoke the discretionary jurisdiction of this Court.

III. CONTRARY TO RESPONDENTS' CONTENTION, THE COURT BELOW HAS INDEED DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT ONLY PRESENT, BUT IMPORTANT FUTURE, IMPLICATIONS.

The decision of the court below directly affects two unrelated cases on the same issue in which counsel for Petitioners happens to be involved, *Edward R. Joyce* v. *Fairview Land Corporation*, FL 75-340-Civ-SMA (D.C.S.D. Fla. 1975), on appeal to the Circuit Court of Appeals for the Fifth Circuit as Case 76-3524, and *Newth Gardens, Inc.* v. *James H. Readyhough*, WPB 75-267-Civ-CF (D.C.S.D. Fla. 1975), on which an opinion on the point at issue has not yet been rendered. Both of these cases have been continued pending the decision of this Court in this case.

Of the reported cases in which others are involved, *Spitz* v. *Herbert Buchwald*, 551 F.2d 1051 (5th Cir. 1977), is on the same issue as the present case and was decided in the same way by the Circuit Court, citing their opinion in the present case.

In view of the numerous condominiums located in Florida, as well as the great number located throughout the United States, which involve the same factual situation as the present case and which were sold more than four years ago, it is far from speculative to say that a veritable flood of cases will be unleashed if the Fifth Circuit's construction of the Statute of Limitations as to when a cause of action accrues under such facts is upheld.

In fact, the Fifth Circuit's decision has opened a Pandora's box by permitting ancient matters to be litigated not only now, but in the future. Such litigation may furthermore be instituted by a person who was not even an original party to the transaction. The original party might have been satisfied with the lease. However, when the original party sold or transferred his condominium unit, the person then acquiring the condominium unit, who thereby assumed the lease, may at any time during the remaining life of the lease sue the lessor under the antitrust laws. The effect of the Fifth Circuit's decision thus is to frustrate the legislative intent of the Congress, which, by passing 15 U.S.C. Sec. 15b, specifically inserted a statute of limitations in the antitrust laws to permit the orderly and uniform demise of ancient causes of actions under the antitrust law.

Contrary to Respondents' contention in their Brief in Opposition (at page 9), the court below, as shown by our Petition (at page 18-19), has placed a new construction on an important Federal statute. If left to stand, it will set a new precedent heretofore not passed upon by this Court.

The Petitioners, therefore, respectfully submit that there is indeed an important question of Federal law involved in the present case which does affect the public.

Furthermore, equally as important is the precedent that the opinion of the court below sets in other unrelated fields. As noted by Professor Kurland of the Chicago Law School:

> "The primary function of the Supreme Court, however, must be in the third of the categories I have delineated. It must, as everyone concedes, confine its role at least to the decisions of important cases, cases that have importance for the law as a whole and not those that merely happen

to involve large sums of money, goods, services or people. These important cases are largely constitutional cases and *cases involving the construction of important federal statutes.*"[3] (emphasis supplied)

In *Baker,* the Seventh Circuit applied the same interpretation of the Statute of Limitations to the Civil Rights Act as it did to the antitrust laws. If the Second Circuit had agreed with such interpretation (which it obviously did not), it would have applied it to the contract in *Korn* v. *Merrill, supra,* involving the Investment Company Act of 1940.

IV. RESPONDENTS ARE IN ERROR IN CONTENDING THAT THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE NEAREST APPLICABLE DECISONS OF THE SUPREME COURT.

As has been shown, the court below (and the Seventh Circuit in *Baker, supra,* upon which the court below relied) misconstrued and misapplied the legal concepts of this Court in the *Zenith* and *Hanover Shoe* cases, the leading cases on the subject.

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[3]Kurland, *Jurisdiction of the United States Supreme Court: Time for a change?* 59 CORNELL L. REV. 616, 619 (1974)

CONCLUSION

For the reasons stated herein and in the petition, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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